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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 251.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Respondents.

No. 252.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Petitioners,

v.

PANAMA CANAL COMPANY,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REBUTTAL BRIEF FOR GRACE LINE *et al.*

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PANAMA CANAL COMPANY,

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REBUTTAL BRIEF FOR GRACE LINE *et al.*

POINT I.

The summary judgment ordered by the Court of Appeals requires that tolls be fixed on the basis of the Canal activity, and without regard to the losses of the business activities. That Court did not decide that the accounts stated by the General Accounting Office were, as such, binding on the defendant.

In view of the questions by the Court as to what the Court of Appeals had decided, it deserves to be noted that the Court of Appeals remanded the case "for judgment for plaintiffs *in accordance with the opinion of the Court*" (R. 258).

That opinion, at R. 248-249, forbade the inclusion of the losses of the business activities in the prescription of tolls.

The Court of Appeals nowhere held that the accounts stated by the General Accounting Office were, as such and as a matter of GAO construction of Section 412(b), binding on defendant.

If the summary judgment granted by the Court of Appeals is affirmed, and it is held that tolls must be fixed on the basis of the Canal operation, plaintiffs will *then* argue to the District Court that the accounts stated by the General Accounting Office *of the Canal operation only*, i.e., as distinguished from the business activities, are binding on the defendant, not because the Court of Appeals so held, but because, in our opinion, the Government Corporation Control Act so requires, once the question of the interpretation of Section 412(b) has been settled. Our argument on this score has not been presented to the Court of Appeals or to this Court. Prayer No. 4 of the complaint, which has received considerable attention in this Court, received no

attention from either side in the Court of Appeals, or from the Court.

POINT II.

Defendant's "ambiguous bookkeeping" has misled its counsel into making incorrect statements in its reply brief. The operating results of the business activities have been reversed and the losses loaded on tolls.

At p. 13 of its reply brief defendant takes issue with plaintiffs' assertion (Plaintiffs' Main Brief, 65-66) that there has been an "unexplained reversal in the operating results of the business activities."

Specifically, defendant asserts at p. 13 that in 1954 the "supporting service operations"—meaning the business activities—"were able to pay a very large portion of the *Administrative and General Expense* [sic] and still earn a profit comparable to that of the Panama Railroad Company."

But the very figures which defendant quotes at p. 13 show that, allocating to the business activities their share of the administrative expense as determined by GAO on the basis of defendant's own analysis (R. 53-54; cf. R. 25, 27), i.e., 75%, defendant's business activities not only failed in 1954 to earn any profit at all, but failed to earn their own administrative expense.

In fact in 1949—the last fiscal year before the Bureau of the Budget study and the Congressional hearings and reports—the business activities earned a *profit* after administrative expense of $1,173,168 (1949 report, The Panama Canal, 28; President's Budget, 1951, p. 158).

On the other hand, for 1958, defendant has budgeted for the business activities a *deficit* after administrative expense of $3,250,450 (President's Budget, 1958, pp. 615, 618, 619).*

Defendant argues (Reply Brief, 14) that the deficit in the business activities was "caused by inexorable economic laws, not by ambiguous bookkeeping and concealment." The point made by the Court of Appeals was that the "ambiguous bookkeeping" had "concealed" the profits of the Canal, R. 249.

POINT III.

There are too many contradictions in the record to warrant acceptance of defendant's protestations of good faith.

Defendant's reply brief protests its good faith respecting its construction of the statute and its failure to allocate overhead to the Canal activity in its bookkeeping.

Yet defendant's brief is silent respecting the legislative history which shows so clearly what was intended; defendant offers no theory as to "share" of the costs of the Canal Zone Government in Section 412(b), a provision which indisputably shows that the Canal was not to pay

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* Operating margin of the "supporting operations" is shown as $886,800 and of "allied maritime operations" as $1,134,500 (pp. 618-619); administrative expense, described as "other general corporate charges," is shown as $7,015,000, of which 75% is attributable to the business activities, *supra*, p. 3. [75% is probably low because in recent years defendant has been treating the direct expense deficit of certain business activities as an administrative expense of the overall operation. Cf. Plaintiffs' Main Brief, Appendix G, 38a.]

the entire cost of the Canal Zone Government and therefore, by necessary implication, not to underwrite the losses of the business activities; defendant does not explain how its 1952 budget program so clearly understood the meaning of the statute, and above all, defendant does not supply the opinion of its own General Counsel who, according to GAO, advised the defendant that it was breaking the law—*a withholding that strikes at the very heart of defendant's claim of good faith.*

POINT IV.

The meaning of the expression "Panama Canal, together with the facilities and appurtenances related thereto" is perfectly clear.

Defendant tries in the reply brief to show that the meaning of the expression "Panama Canal, together with the facilities and appurtenances related thereto" is doubtful. Yet defendant's definitions of "Canal activities" in its 1952 report (R. 171), and in its 1952 budget program (Appendix A, 27a) and Tables 30 and 31 of its 1952 report, not printed in the Record, shows that it understood that expression very well.

Defendant seems to argue (Reply Brief, 11) that to allocate general expense to the Canal activity is not feasible as a matter of accounting. However defendant was able to make such allocations without difficulty in its 1952 budget program (Plaintiffs' Main Brief, Appendix F, 26a-32a). The Comptroller General has had no trouble in making such allocations.

Defendant suggests, if we understand its brief correctly (Reply Brief, 18-19), that plaintiffs claim that *all* the

properties transferred in 1956 are to be included in the tolls formula. We make no such claim. President Truman's transfer order, following Section 10 of the Act of 1950, distinguishes between the Canal and its facilities, and other facilities then transferred (Plaintiffs' Main Brief, 31-33).

POINT V.

To include the losses of the business activities violates the Hay-Pauncefote treaty.

Defendant's argument on this score seems to be based on the claim that the British Government once said that warships going through the Canal *for its protection* need not pay a toll. The relevance of this statement is not understood. Certainly the British Government has never conceded that national defense costs properly entered the rate base. In view of the British Government's initial position in 1899-1900, agreed to by Secretary Hay, that the United States should not even fortify the Canal (Doc. 746, 61st Cong., 3d Sess.), any such concession would seem most unlikely. The British Government, when protector of the Suez Canal, never charged for that service; neither the British nor United States Governments presently agree that military protection is properly included in the Suez Canal rate base. Moreover, Armed Forces expenditures at Panama are for "national defense", not for the defense of the Isthmus as such.

POINT VI.

The reply brief arguments respecting mandatory injunction are invalid.

Our argument respecting the mandatory injunction granted by this Court in *Brown* v. *Board of Education*, 347 U. S. 483, and related cases, is hardly answered by showing what one plaintiff asked for.

The lower court "segregation" cases frequently involve double negative injunctions, it is true, but such injunctions are in substance mandatory. Indeed such injunctions were characterized in *Liscio* v. *Campbell*, 34 F. 2d 646, 647 (C. A. 2d), as the "starkest of solecisms."

Whether or not there was special statutory authority for the mandatory injunctions in the Interstate Commerce Act cases, a point we have not had time to research, certainly such cases as *In re Lennon* turned on the ground that the federal courts had general power to grant mandatory injunctions. That point was expressly held.

Defendant cites no provision of the Railway Labor Act which authorizes the mandatory injunctions granted in *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, *Delaware & Hudson R. Corp.* v. *Williams*, 129 F. 2d 11 (C. A. 7th), or *Steele* v. *L. & N. R. Co.*, 323 U. S. 192. We can find none, and the courts cited none.

Defendant distinguishes the prohibition cases on the ground that the "necessary implication" of the National Prohibition Act was that the courts had power to grant mandatory relief. Certainly the provision of the Adminis-

trative Procedure Act is far more specific than that of the National Prohibition Act.

April 9, 1958.

Respectfully submitted,

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